

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

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DOMINGO CASTILLO MARCELINO,  
*individually and on behalf of others  
similarly situated,*

16 Civ. 06287 (KPF)

*Plaintiff,*

--against--

374 FOOD INC., HAYIM TSADOK and  
TIRAN TSADOK,

*Defendants.*

-----X

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS’  
MOTION TO DISQUALIFY MR. FAILLACE’S COUNSEL**

Brian Lehman  
Lehman LG LLC  
244 Fifth Ave., B258  
New York, New York 10001  
*Counsel for Defendants*

Defendants 374 Food Inc. (“Tribeca Bagels”), Tiran Tsadok and Hayim Tsadok respectfully submit this memorandum of law in support of their motion to disqualify Michael Ross and Eugene Gormakh from representing “Michael Faillace, Esq., and Michael Faillace & Associates, P.C.” Exhibit 1 (Dkt. #93, #94). (For the sake of readability, Mr. Faillace and his firm are referred to jointly as “Mr. Faillace” in this memorandum.)

Mr. Faillace has retained counsel to represent him and this counsel (Mr. Ross and Mr. Gormakh) has appeared in this case. *See id.* However, Mr. Faillace is not a party to this case. Rather, Mr. Faillace is an attorney representing Domingo Castillo Marcelino, a plaintiff who initiated this case with the complaint filed and signed by Mr. Faillace (Dkt. #1).

Defendants are unaware of any case in the past 229 years that allows counsel to appear in federal court on its behalf of counsel who is in turn representing a party. Attorneys represent parties in federal court; attorneys do not represent other attorneys who are representing a party.<sup>1</sup> In fact, now that Mr. Faillace has counsel, Defendant’s counsel cannot communicate with Mr. Faillace under New York’s Rules of Professional Conduct (22 NYCRR 1200.0): “In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.” *Id.*, Rule 4.2. Although this bar to communication with Plaintiff’s counsel is the logical

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<sup>1</sup> Even the Court’s CM/ECF system rejects recognizing Mr. Faillace as a “party.” The Court’s system reports: “The following attorney/party associations do not exist for the above case(s).”

result of Mr. Faillace hiring counsel to represent him and his firm, this is absurd and demonstrates why counsel may not retain counsel to appear in a case.<sup>2</sup>

The fact that Mr. Faillace has retained counsel also underscores what has long been obvious: The Court should disqualify Mr. Faillace from representing Plaintiff. Defendants expect, and have notified Mr. Faillace, that they will be filing a motion to disqualify Mr. Faillace as well as seeking a writ of mandamus. Defendants will seek to file this motion to disqualify Mr. Faillace as soon as possible.

Nonetheless, the Court has an independent duty to protect the public's trust in the integrity of the adversary process. *See, e.g., In re MTBE*, 438 F. Supp. 2d 305, 306-307 (S.D.N.Y. 2006) (stating that after one of plaintiff's firm had been retained to represent defendants in a separate action, the Court *sua sponte* "raised the issue of whether the Firms should be disqualified from representing . . . plaintiffs due to a risk of taint arising from the dual representation."); *see also Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384 (2d Cir. 1976) ("an attorney must avoid not only the fact, but even the appearance, of representing conflicting interests") (citations and quotation marks omitted).

There is no doubt that Mr. Faillace's counsel's resumes are impressive. For example:

Mr. Ross currently serves as a member of the New York State Bar Association's Committee on Professional Discipline; the New York County Lawyers' Association Committee on Professional Discipline; the New York State Bar Association's Special Committee on the Unlawful Practice of Law; and the New York State Bar Association's Committee on Mass Disasters. He previously served for a number of terms on the Association of the Bar of the City Of New York's Committee on Professional Discipline, the New York State Bar Association Special Committee on Procedures for Judicial Discipline, and the New York State Bar Association's Task Force On Lawyer Advertising.

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<sup>2</sup> As a mere logic, by filing this motion and memorandum of law, I have communicate with Mr. Faillace and violated Rule 4.2, which demonstrates why counsel may not have counsel's counsel appear in a case in which counsel is appearing.

Exhibit 2.

Mr. Faillace's counsel has reached out to Defendants' counsel, Exhibit 3, and Defendants' counsel has no problem discussing the ethical issues with Mr. Faillace's counsel. Indeed, Mr. Ross may well be able to facilitate a joint statement to the Court and Defendants' counsel will endeavor to do so.

But Mr. Faillace's counsel may not appear in this case to represent Mr. Faillace when Mr. Faillace is, in turn, representing a party to action.

Respectfully submitted,

/s/ Brian Lehman

Brian Lehman  
Lehman LG LLC  
244 Fifth Ave., B258  
New York, New York 10001  
*Counsel for Defendants*

All Counsel of Record  
serve by CM/ECF

Exhibit 2.

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But Mr. Faillace's counsel may not appear in this case to represent Mr. Faillace when Mr. Faillace is, in turn, representing a party to action.

Respectfully submitted,

/s/ Brian Lehman

Brian Lehman  
Lehman LG LLC  
244 Fifth Ave., B258  
New York, New York 10001  
*Counsel for Defendants*

All Counsel of Record  
serve by CM/ECF

# Exhibit 1

# UNITED STATES DISTRICT COURT

for the

Southern District of New York



\_\_\_\_\_  
Castillo Marcelino, et al.

*Plaintiff*

v.

\_\_\_\_\_  
374 Food Inc., et al.

*Defendant*

)  
)  
) Case No. 16-CV-06287  
)  
)

## APPEARANCE OF COUNSEL

To: The clerk of court and all parties of record

I am admitted or otherwise authorized to practice in this court, and I appear in this case as counsel for:

\_\_\_\_\_  
Michael Faillace, Esq., and Michael Faillace & Associates, P.C.

Date: 04/02/2019

\_\_\_\_\_  
s/ Michael S. Ross

*Attorney's signature*

\_\_\_\_\_  
Michael S. Ross, Esq. (MR-3626)

*Printed name and bar number*

\_\_\_\_\_  
60 East 42nd Street  
Forty-Seventh Floor  
New York, New York 10165

*Address*

\_\_\_\_\_  
michaelross@rosslaw.org

*E-mail address*

\_\_\_\_\_  
(212) 505-4060

*Telephone number*

\_\_\_\_\_  
(212) 505-4054

*FAX number*

# UNITED STATES DISTRICT COURT

for the

Southern District of New York



\_\_\_\_\_  
Castillo Marcelino, et al.

*Plaintiff*

v.

\_\_\_\_\_  
374 Food Inc., et al.

*Defendant*

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) Case No. 16-CV-06287  
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## APPEARANCE OF COUNSEL

To: The clerk of court and all parties of record

I am admitted or otherwise authorized to practice in this court, and I appear in this case as counsel for:

\_\_\_\_\_  
Michael Faillace, Esq., and Michael Faillace & Associates, P.C.

Date: 04/02/2019

\_\_\_\_\_  
s/ Eugene Gormakh

*Attorney's signature*

\_\_\_\_\_  
Eugene Alexander Gormakh, Esq. (EG-5900)

*Printed name and bar number*

\_\_\_\_\_  
60 East 42nd Street  
Forty-Seventh Floor  
New York, New York 10165

*Address*

\_\_\_\_\_  
eugenegormakh@rosslaw.org

*E-mail address*

\_\_\_\_\_  
(212) 505-4135

*Telephone number*

\_\_\_\_\_  
(212) 505-4054

*FAX number*



# Exhibit 2

# LAW OFFICES OF MICHAEL S. ROSS | COUNSEL TO GREAT LAWYERS AND LAW FIRMS.

## Attorneys

And Professional Staff

Michael S. Ross, Esq.  
James D. Liss, Esq.  
Eugene Gormakh, Esq.  
Jaimini A. Vyas, Esq.  
Josephine Paz



### **MICHAEL S. ROSS, ESQ.**

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Michael S. Ross is the principal of the Law Offices of Michael S. Ross, where he concentrates his practice in attorney ethics. He is a former Assistant United States Attorney in the Criminal Division of the Southern District of New York and also served as an Assistant District Attorney in Kings County. Mr. Ross has been an Adjunct Professor at Benjamin N. Cardozo Law School since 1980 (where he teaches Fall and Spring Semester courses in Litigation Ethics). Mr. Ross has also taught a variety of trial practice and judicial administration courses as an Adjunct Associate Professor at Brooklyn Law School since 2005 (where he teaches a Fall course in Professional

Responsibility, and has taught Spring and Summer courses over the years as well). In addition, in three and a half decades of teaching at Cardozo Law School, he has taught a variety of ethics, trial practice and judicial administration courses.

Mr. Ross is a frequent lecturer and author on topics involving ethics, trial practice and criminal law for such organizations as the Practicing Law Institute, the Appellate Divisions, First and Second Departments, the Association of the Bar of the City of New York, the New York State Judicial Institute, the National Institute of Trial Advocacy, the New York State Bar Association, the New York County Lawyers' Association, the New York State Association of Trial Lawyers and the New York State Academy of Trial Lawyers.

Mr. Ross currently serves as a member of the New York State Bar Association's Committee on Professional Discipline; the New York County Lawyers' Association Committee on Professional Discipline; the New York State Bar Association's Special Committee on the Unlawful Practice of Law; and the New York State Bar Association's Committee on Mass Disasters. He previously served for a number of terms on the Association of the Bar of the City Of New York's Committee on Professional Discipline, the New York State Bar Association Special Committee on Procedures for Judicial Discipline, and the New York State Bar Association's Task Force On Lawyer Advertising.

Mr. Ross completed a five-year tenure as an appointed member of the New York State Continuing Legal Education Board, which, among other things, formulates CLE guidelines in the State. Mr. Ross has chaired the American Bar Association ("ABA") Grand Jury Committee and the City Bar Association's Committee on Criminal Advocacy. He previously served as the ABA Criminal Justice Section's liaison to the ABA Standing Committee on Ethics and Professional Responsibility and was an appointed member of the ABA's Special Criminal Justice In Crisis Committee.

Among his writings, Mr. Ross has co-authored a chapter on "Client and Witness Perjury," for the ABA's Section of Litigation ethics training course book entitled "Litigation Ethics: Course Materials For Continuing Legal Education." The course book was developed for use nationally by law firms, bar associations and other groups which provide ethics training. [Download full bio.](#)

### **JAMES D. LISS, ESQ.**

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James D. Liss is an associate at the Law Offices of Michael S. Ross, having joined the firm in March of 2011, after more than 30 years of experience (as an associate, and then as counsel) with an AmLaw25 law firm. He focused his practice over the years on legal ethics and professional responsibility, appeals, drafting, editing and reviewing briefs and memorandum, and in advising lawyers (both within the firm and outside of the firm) and clients on matters involving a wide variety of complicated and difficult legal issues. He has experience in a broad range of practice areas, in addition to legal ethics and professional responsibility, including general and commercial litigation, federal

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Mr. Liss earned his Bachelor's Degree *summa cum laude* from the University of Pennsylvania in 1973, and his law degree *magna cum laude* from Harvard Law School in 1976, where he served as a Note Editor on the *Harvard Law Review*. After graduating from law school, Mr. Liss served as a Law Clerk to the Honorable Arlin M. Adams, United States Circuit Court Judge for the Third Circuit Court of Appeals, from 1976 to 1977. He was admitted to practice in New York State in 1977, and, since that time, has been admitted to practice before the United States District Courts for the Southern and Eastern Districts of New York, and before the United States Courts of Appeals for the Second, Third, Fifth, Sixth and Tenth Circuits.

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**EUGENE GORMAKH, ESQ.**

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Eugene Gormakh is an associate at the Law Offices of Michael S. Ross, where he concentrates his practice in representing lawyers and law firms before disciplinary authorities. Mr. Gormakh's practice also includes providing guidance to lawyers and law firms on the application of ethical rules to the day-to-day practice of law, as well as representing law school graduates in connection with bar admission matters. He also regularly assists in the preparation of Continuing Legal Education materials on legal ethics issues, which are distributed at various bar programs. In addition, Mr. Gormakh has assisted the firm in a variety of criminal matters in federal and state courts. Mr. Gormakh joined the firm in 2009 while attending law school and has been an associate at the firm since his admission to the New York Bar in 2013.

Mr. Gormakh earned his law degree from Western New England University School of Law in 2012, and he earned his M.B.A. from the University's College of Business that same year. During his law school tenure, Mr. Gormakh was named to the dean's list, won several awards for academic achievement, competed on the law school's national First Amendment moot court team, and worked as a research assistant to his products liability law professor. Mr. Gormakh also volunteered for the American Civil Liberties Union and interned at the United States Attorney's Office. Mr. Gormakh currently serves a Member of the New York State Bar Association's Committee on Mass Disaster Response.

Mr. Gormakh was selected to the 2016, 2017 and 2018 New York Metro Rising Stars lists by *Super Lawyers* magazine.

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**JAIMINI A. VYAS, ESQ.**

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Jaimini A. Vyas is an associate at the Law Offices of Michael S. Ross. Mr. Vyas assists Mr. Ross and his associates in representing lawyers and law firms before disciplinary authorities and providing guidance to lawyers and law firms on the application of ethical rules to the day-to-day practice of law.

Mr. Vyas earned his Bachelor of Science and Bachelor of Law degrees from the National University of Juridical Sciences in India in 2013. He earned his Juris Doctor from the Benjamin N. Cardozo School of Law in 2017. During law school, Mr. Vyas served as the Articles Editor for the *Cardozo Public Law, Policy & Ethics Journal*, served as a research assistant, and interned at the Federal Trade Commission, the Legal Aid Society, and for a well-known criminal defense firm. Following his graduation from law school in 2017, Mr. Vyas worked as a Staff Attorney at the Brooklyn Defender Services where he represented indigent criminal defendants. Mr. Vyas joined the firm in 2019.

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**JOSEPHINE PAZ, LEGAL ASSISTANT**

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Josephine Paz is a legal assistant at the Law Offices of Michael S. Ross, where she assists Mr. Ross and his associates in all aspects of the firm's practice. Since joining the firm in 2007, Ms. Paz has worked on a broad range of attorney disciplinary matters, reinstatement matters, and bar admission matters. She has assisted the firm in representing lawyers and law firms in all stages of the disciplinary process, and has "second-chaired" Mr. Ross at many disciplinary and reinstatement hearings before the Appellate Divisions. In addition to her experience assisting in attorney ethics and professional responsibility matters, Ms. Paz has assisted Mr. Ross at the trial of a complex, multi-defendant insider trading case in the Southern District federal court.

Ms. Paz earned her Bachelor's Degree, *summa cum laude* with Phi Beta Kappa honors, from Hamilton College in 2006. She attended Hamilton College as a Bristol Scholar, majoring in Anthropology, and received the school's Harold C. Bohn Prize in Anthropology based upon her outstanding senior thesis.

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# Exhibit 3

Subject Castillo Marcelino v. 374 Food, Inc.  
From Michael Ross <michaelross@rosslaw.org>  
To brian@lehmanlawgroup.com <brian@lehmanlawgroup.com>  
Cc Eugene Gormakh, Esq. <EugeneGormakh@rosslaw.org>  
Date 2019.04.02 11:37 am

Mr. Lehman:

I will be filing a Notice of Appearance as Professional Responsibility Counsel on behalf of Mr. Faillace and his Firm shortly in connection with the sanctions issue raised in the *Marcelino* case. I am committed today and until late this evening but will reach out to discuss this matter with you during a break tomorrow.

Regards,

Michael

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